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In the Supreme Court of the United States

OCTOBER TERM, 1982

COMMANDER GEORGE C. CHAPPELL, ET AL.,
PETITIONERS

v.

VERNON WALLACE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether servicemen may sue their superior officers for damages for alleged constitutional violations incident to military service.

PARTIES TO THE PROCEEDING

The petitioners are Commander George C. Chappell, Lieutenant Commander Kenneth Viafore, Lieutenant Clarence Schultz, Lieutenant Barron Bianco, Lieutenant Kenneth Jordan, Engine Man Chief Richard McCannon, Internal Communications Chief David Lamser, and Mess Management Specialist Chief Lumberto Papa. The respondents are Vernon Wallace, Robert Lemons, Cornelius Hickey, James Richardson, and George Shannon.

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OCTOBER TERM, 1982

No.

COMMANDER GEORGE C. CHAPPELL, ET AL.,
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v.

VERNON WALLACE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of Commander George C. Chappell, *et al.*, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-20a) is reported at 661 F.2d 729. The order of the district court (App. C, *infra*, 22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1981, and a petition for rehearing was denied on March 2, 1982 (App. B, *infra*, 21a).

On May 24, 1982, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including July 16, 1982, and on July 2, 1982, Justice Rehnquist further extended the time in which to file a petition for a writ of certiorari to and including July 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondents, black enlisted men in the Navy serving on board the U.S.S. Decatur, brought this suit against petitioners, their superior officers on the Decatur, in 1978.[1] Respondents claimed that because of their race, petitioners "assigned them the least desirable duties, excluded them from training programs, [gave] them low performance evaluations, and punished them with unusual severity for minor transgressions" (App. A, *infra*, 2a). Respondents based their claims directly on the Constitution (*id.* at 2a n.1).[2] They sought $10 million in compensatory and punitive damages from petitioners, as well as declaratory and injunctive relief (E.D. 17).

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[1] Petitioner Chappell was the Commanding Officer of the Decatur; petitioner Schultz, the Engineering Officer; petitioner Viafore, the Executive Officer; petitioner Jordan, the Operations Officer; petitioner Bianco, the Supply Officer; petitioner McCannon, the Chief of the Engineering Department; petitioner Lamser, the Chief of the Electrical Division; and petitioner Papa, the Chief of the Supply Department. E.D. 3-4. ("E.D." refers to the Excerpt of Documents filed in the court of appeals.)

[2] Respondents' claims also rested on 42 U.S.C. (Supp. III) 1985(3), and the court of appeals ruled that its analysis of "reviewability" (see pages 3-4, *infra*) would govern Section 1985(3) claims as well as claims based directly on the Constitution (App. A, *infra*, 8a-9a n.5).

The United States District Court for the Southern District of California dismissed the complaint, ruling that respondents' damages action was barred by an "intra-service immunity" (App. C, *infra*, 22a). The district court also ruled that the actions of which respondents complained were "nonreviewable military decisions" and that respondents had failed to exhaust their administrative remedies (*ibid.*).

The court of appeals reversed (App. A, *infra*, 1a-20a). It noted at the outset (*id.* at 2a n.1) that respondents, in bringing a damages action directly under the Constitution, were relying on *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). But the court of appeals merely stated that "*Bivens* has been extended to fifth amendment equal protection claims" (App. A, *infra*, 2a n.1, citing *Davis* v. *Passman*, 442 U.S. 228 (1979)) and did not address the question whether *Bivens* empowered the court to confer on servicemen an implied cause of action for damages against their superior officers.

Instead, the court of appeals discussed the "reviewability" of respondents' claims and whether petitioners were absolutely immune from damages liability for suits arising from their military duties. The court stated that the "reviewability" question—which it defined as "whether a court may review [the challenged] military decision[s] to determine whether a substantive wrong has been committed" (App. A, *infra*, 4a)—could "arise regardless of the identity of the defendant, *i.e.*, whether the defendant is the United States or an individual federal official, and regardless of whether the remedy sought is damages or some form of nonmonetary relief" (*ibid.*). The court of appeals then held that in order to be reviewable, a claim would have to allege the violation of

"a 'recognized' constitutional right" and "amount to more than a traditional state law claim" (*id.* at 10a); the court concluded that respondents' claims fulfilled this criterion (*id.* at 19a). Beyond that, the court held that the reviewability of military decisions would depend on four factors (*id.* at 7a; emphasis omitted):

> (1) The nature and strength of the plaintiff's claim * * *. (2) The potential injury to the plaintiff if review is refused. (3) The extent of interference with military functions[,] * * * [although] interference per se should not preclude review because some degree of interference will always exist. (4) The extent to which military discretion or expertise is involved.

The court of appeals derived these factors from *Mindes* v. *Seaman*, 453 F.2d 197, 201-202 (5th Cir. 1971), which was not a *Bivens* action but a suit by a serviceman seeking declaratory and injunctive relief in connection with an allegedly erroneous performance evaluation. See 453 F.2d at 198. The court of appeals ordered the district court, on remand, to balance the four *Mindes* factors in deciding whether respondents' claims were reviewable (App. A, *infra*, 20a).[3]

The court of appeals then considered "whether [petitioners] possess[] official immunity" (App. A, *infra*, 12a). Relying principally on *Butz* v. *Economou*, 438 U.S. 478 (1978), the court held that "except in unusual circumstances"—such as, possibly, when a suit challenged a military decision made in combat, or by an officer acting in a judicial or prose-

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[3] The court of appeals also held that respondents were required to exhaust their administrative remedies, but it overturned the district court's decision that they had not done so here and instructed the district court to reconsider the issue (App. A, *infra*, 3a n.2, 20a).

cutorial role—military officers would be accorded only a qualified, not an absolute, immunity from suit (App. A, *infra*, 14a, 16a-18a & n.10). The court acknowledged that absolute immunity would avoid the "threat to discipline" posed by military officers' potential monetary liability, but it considered this a "marginal benefit" insufficient to "offset the substantial policies opposing absolute immunity" (*id.* at 15a).

REASONS FOR GRANTING THE PETITION

The court of appeals—alone among the appellate courts that have considered the issue—has held that a serviceman may sue his superior officers for damages for alleged constitutional violations incident to military service. This unwarranted extension of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), presents a significant potential threat to military discipline. It is also inconsistent with this Court's recognition, in related contexts, that permitting a serviceman to hale his superiors into court and hold them accountable in damages crucially undermines the hierarchical relationships that are unique, and essential, to the military. Because the court of appeals has incorrectly resolved an issue of great practical importance to the armed services, review by this Court is warranted.

1. This Court held in *Bivens* that a person whose constitutional rights are violated by a federal official may, in some circumstances, seek damages from the official in federal court. But *Bivens* and subsequent cases have emphasized that a constitutional damages remedy will not be implied if there are " 'special factors counselling hesitation in the absence of affirmative action by Congress.' " 403 U.S. at 396, quoted in *Carlson* v. *Green*, 446 U.S. 14, 18-19 (1980); see *Nixon* v. *Fitzgerald*, No. 79-1738

(June 24, 1982), slip op. 22 n.37; *Davis* v. *Passman*, 442 U.S. 228, 245-247 (1979).

The "peculiar and special relationship of the soldier to his superiors" (*United States* v. *Brown*, 348 U.S. 110, 112 (1954)) is such a special factor. As this Court has remarked of the military context, "the right to command and the duty to obey ordinarily must go unquestioned" (*Brown* v. *Glines*, 444 U.S. 348, 357 (1980)). The court of appeals' approach—by allowing a serviceman to threaten his superior officers with personal damages liability, and to impose on them the burdens of litigation, for every real or imagined grievance—will undermine the command relationship, forcing officers to hesitate before ordering actions that military discipline requires, but that a serviceman might resent.[4]

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[4] For example, according to the complaint in this case, respondent Wallace was dissatisfied with his duty assignment (E.D. 5-6); respondent Lemons urged that his work load was excessive and that he should not have been fined $50 for leaving his work clothes in his work area instead of a locker (E.D. 8); respondent Hickey asserted that he was unjustly denied a recommendation for a promotion (E.D. 10-11); respondent Richardson alleged that a white serviceman with less experience was given greater training opportunities (E.D. 13); and respondent Shannon objected to, among other things, being ordered, together with other servicemen, to clean a stove with a toothbrush (E.D. 15). Respondents made the conclusory assertion that these actions by petitioners deprived them of their "rights under the Constitution and laws of the United States, including the right not to be discriminated against because of [their] race, color or previous condition of servitude, the right not to be deprived of rights and privileges of the United States Navy without due process, the right not to be limited in the rights and privileges guaranteed by the statutes of the United States, and the right to obtain equal employment opportunities while in the United States Navy" (E.D. 6; see E.D. 9, 11, 13, 15). The suit was not joined by

For similar reasons, this Court has held, even in less compelling contexts, that the importance of avoiding judicial intrusion into the relationship between a serviceman and his superiors overcomes even an apparently strong presumption in favor of granting relief. The Federal Tort Claims Act, for example, permits tort suits against the United States in a wide range of cases, and contains no express exemption for the military. See 28 U.S.C. 1346(b) and 2671 *et seq.* But in *Feres* v. *United States*, 340 U.S. 135 (1950), the Court ruled that the FTCA does not permit servicemen to sue the United States for service-related injuries; the Court reached this conclusion despite several indications, which it acknowledged, that Congress intended to permit servicemen to recover against the United States. See *id.* at 138-139.

The "basis of *Feres* was the Court's concern with the disruption of '[t]he peculiar and special relationship of the soldier to his superiors' that might result if the soldier were allowed to hale his superiors into court." *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 676 (1977) (Marshall, J., dissenting), quoting *United States* v. *Brown*, *supra*, 348 U.S. at 112. See *United States* v. *Muniz*, 374 U.S. 150, 162 (1963). The Court was specifically concerned that "[t]he trial [of such a claim] would * * * involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions." *Stencel Aero Engineering Corp.* v. *United States*, *supra*, 431 U.S. at 673. These concerns are

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all the black servicemen on board the Decatur; several, including the ship's equal employment opportunity adviser, filed affidavits in the district court supporting petitioners. See E.D. 40-45.

vastly greater when a serviceman, instead of seeking damages from the United States, "hale[s] his superiors into court" as defendants and threatens them with massive personal liability. See *Carlson* v. *Green*, *supra*, 446 U.S. at 21 (threat of personal liability has a greater impact on officials' behavior than the possibility that the government will be held liable); *Owens* v. *City of Independence*, 445 U.S. 622, 653 n.37, 655-656 (1980) (same). If "the effect of [an FTCA] action upon military discipline" (*Stencel Aero Engineering Corp.* v. *United States*, *supra*, 431 U.S. at 673) justified the Court in finding an implied exception to the FTCA,[5] surely the court of appeals should have hesitated before granting respondents a personal damages remedy directly against their superior officers—especially when Congress has given no indication that it favors such a remedy.[6] See *Jaffee* v. *United States*, 663 F.2d 1226, 1235 (3d Cir. 1981) (en banc), cert. denied, No. 81-1346 (May 17, 1982) ("suits based on service injuries involve, as a general matter, 'special factors counseling hesitation' ").

2. As the court of appeals recognized (App. A, *infra*, 19a n.11), Congress has provided alternative remedies that servicemen such as respondents may invoke to redress their grievances. These remedies are significant for two related reasons. First, the

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[5] Congress has, however, endorsed the *Feres* principle. See, *e.g.*, H.R. Rep. No. 97-384 (Pt. I), 97th Cong., 1st Sess. 5 (1981).

[6] Indeed, Congress did not extend Title VII of the Civil Rights Act of 1964, which provides administrative and judicial remedies for racial discrimination in federal employment (see 42 U.S.C. 2000e-16), to the military. *Johnson* v. *Alexander*, 572 F.2d 1219 (8th Cir.), cert. denied, 439 U.S. 986 (1978).

Court has stated that it will not find an implied damages remedy for a constitutional violation if Congress has provided a substitute remedy that is equally effective. *Carlson* v. *Green*, *supra*, 446 U.S. at 18-19; see *Davis* v. *Passman*, *supra*, 442 U.S. at 245-247; *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, *supra*, 403 U.S. at 397. Second, the contrast between the remedies Congress has provided for aggrieved servicemen and the *Bivens* remedy granted by the court of appeals demonstrates the inappropriateness of the court's augmenting Congress' remedial design in this fashion. See *Rostker* v. *Goldberg*, 453 U.S. 57, 65, 68 (1981), quoting *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968) (Congress' power over military affairs is " 'broad and sweeping' " and courts "must be particularly careful not to substitute [their own] judgment of what is desirable for that of Congress").

By statute, any serviceman "who believes himself wronged by his commanding officer" has the right to invoke the review of an officer superior in rank to the commanding officer; the superior officer is authorized to "take proper measures for redressing the wrong complained of." 10 U.S.C. 938. To the extent respondents complain of discriminatory nonjudicial punishment, they may similarly seek relief by appealing up the chain of command. See 10 U.S.C. 815(e). Congress has also provided for the Board for the Correction of Naval Records, a forum in which respondents may challenge allegedly discriminatory performance evaluations or promotion decisions. See 10 U.S.C. 1552; 32 C.F.R. Part 723. Congress vested the Secretary of the Navy, acting through the Board, with plenary power to "correct an error or remove an injustice" (10 U.S.C. 1552(a)), and in appropriate cases the Board may issue orders leading

to retroactive promotions and back pay. See generally *Thornton* v. *Coffey*, 618 F.2d 686, 692 (10th Cir. 1980); *Knehans* v. *Alexander*, 566 F.2d 312, 315 (D.C. Cir. 1977), cert. denied, 435 U.S. 995 (1978).[7]

These remedies established by Congress, unlike the *Bivens* remedy inferred by the court of appeals, preserve the military chain of command. If officers act wrongfully toward servicemen, they are subject to discipline imposed by *their* military superiors. But in a *Bivens* action, servicemen would call their superiors to account. Courts and juries (see *Carlson* v. *Green*, *supra*, 446 U.S. at 22-23), acting at the behest of servicemen and enforcing the judicially-created *Bivens* remedy, would be able to determine the circumstances in which superior officers are subject to sanctions for their behavior toward those they command. In addition, courts and juries would determine the nature and amount of the sanctions; here, for example, respondents seek punitive damages (see *Carlson* v. *Green*, *supra*, 446 U.S. at 21-22).

Judgments about the measure of discipline to impose on a military officer for acting improperly toward a subordinate are principal examples of the " 'complex, subtle, and professional decisions as to the composition, training, * * * and control of a military force' " about which this Court has said, " '[i]t is difficult to conceive of an area of governmental activity in which the courts have less competence.' " *Rostker* v. *Goldberg*, *supra*, 453 U.S. at 65-66, quoting *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973). These judgments are properly made by the officials desig-

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[7] In addition, as the court of appeals noted, the Navy has established "comprehensive" internal equal opportunity procedures "for reporting incidents and processing complaints" of racial discrimination. App. A, *infra*, 19a n.11.

nated by Congress and the executive branch. But under the court of appeals' approach, courts and juries would make these judgments. See *Butz* v. *Economou*, 438 U.S. 478, 503 (1978), citing *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, *supra*, 403 U.S. at 409 (Harlan, J., concurring) (in deciding whether to infer a *Bivens* remedy, a court must consider "whether the courts are qualified to handle the types of questions raised by the plaintiff's claim").

The tensions inherent in military life make it particularly inadvisable to accord servicemen a judicially-created damages remedy against their superior officers. Because " 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise,' * * * the military must insist upon a respect for duty and a discipline without counterpart in civilian life." *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975), quoting *Toth* v. *Quarles*, 350 U.S. 11, 17 (1955). And " 'the rights of men in the armed forces must perforce be conditioned to meet [these] overriding demands of discipline and duty * * *.' " *Parker* v. *Levy*, 417 U.S. 733, 744 (1974), quoting *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion). In order to maintain this extraordinary discipline, commanding officers will necessarily and frequently make decisions that servicemen or civilians—perhaps unaccustomed to the military's "specialized society * * * [with] laws and traditions of its own" (*Parker* v. *Levy*, *supra*, 417 U.S. at 743)—may consider unjust.

If, in these circumstances, a commanding officer must constantly consider the possibility that he will be sued for damages, his ability to lead effectively—"the right to command in the officer, [and] the duty of obedience in the soldier" (*In re Grimley*, 137 U.S.

147, 153 (1890))—will be undermined. Moreover, courts administering a judicially-created remedy are not the proper forum for resolving the grievances that arise in such a context. As this Court explained in another case in which a serviceman challenged a military personnel decision he thought was unfair:

> We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates.

Orloff v. *Willoughby*, 345 U.S. 83, 93-94 (1953).

3. The court of appeals did not take adequate account of these concerns. The court simply assumed that a *Bivens* action was available to respondents; at no point did it specifically consider whether the factors that counsel hesitation in the military context, or the alternative remedies available to servicemen, should preclude servicemen from seeking a *Bivens* remedy against military officials.[8]

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[8] In addition, the court of appeals appears to have assumed (see, *e.g.*, App. A, *infra*, 11a, 16a n.10) that a distinction can be drawn between military decisions related to preparation for combat and those decisions somehow unconnected to combat. But as this Court has explained, no such distinction can be applied:

> [R]estrictions necessary for the inculcation and maintenance of basic discipline and preparedness are as justified on a regular base in the United States * * * as on a training base * * * or a combat-ready installation in the Pacific * * *. Loyalty, morale, and discipline are essential

Instead, the court discussed whether petitioners would have a "nonreviewability" or an immunity defense. But the court of appeals' reviewability criteria do not differentiate between suits for declaratory and injunctive relief, on the one hand, and suits that threaten officials with personal damages liability, on the other. Indeed, the court made it clear that these criteria were to apply in the same way irrespective of the remedy; commenting on "the possibility that military operations will be disrupted [by suits like respondents'], and the possibility of courts usurping military functions that they lack the competence to perform," the court of appeals said simply: "Once a claim has been found reviewable, allowing a damages remedy would not exacerbate either the disruption or the usurpation" (App. A, *infra*, 16a n.9). For obvious reasons, however, the threat of a suit for personal damages will have a far more inhibiting effect on commanding officers than the possibility that their actions may be set aside if found invalid. The court of appeals' decision to apply one set of "reviewability" criteria to both categories of cases, therefore, is an inadequate treatment of the question whether servicemen should have a *Bivens* action against their superior officers.

The court of appeals' discussion of the immunity issue is also not an adequate response to the question whether *Bivens* actions by servicemen should be allowed. The court did not distinguish, in its discussion of military officials' immunity, between damages suits

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attributes of all military service. Combat service obviously requires them. And members of the Armed Services, wherever they are assigned, may be transferred to combat duty or called to deal with civil disorder or natural disaster.

Brown v. *Glines*, *supra*, 444 U.S. at 356-357 n.14.

brought by servicemen and damages suits brought by civilians. But as we have explained, the reasons for not permitting a *serviceman* to bring a *Bivens* action against his superiors are particularly strong. The military's "special functions" (*Butz* v. *Economou*, *supra*, 438 U.S. at 507) are central to the protection of the national security (see *Harlow* v. *Fitzgerald*, No. 80-945 (June 24, 1982), slip op. 11 & nn.18, 19) and it is therefore particularly important to protect military officials "from undue interference with their duties and from potentially disabling threats of liability" so as to ensure "the unhesitating performance of functions vital to the national interest" (slip op. 5). Whatever the strength of these arguments in the context of suits by civilians challenging actions taken by military officers within the scope of their official duties, the policy considerations underlying the absolute immunity defense are compelling in the context of suits by servicemen.[9] Some courts have accordingly ruled—reaching the correct result, in our view—that an "intra-military immunity" bars servicemen's suits against their superior officers. See, *e.g.*, *Thornwell* v. *United States*, 471 F. Supp. 344, 347-348 (D.D.C. 1979); *Misko* v. *United States*, 453 F. Supp. 513, 515 (D.D.C. 1978), aff'd, 593 F.2d 1371 (D.C. Cir. 1979). See also *Hass* v. *United States*, 518 F.2d 1138, 1142-1143 (4th Cir. 1975); *Bailey* v. *DeQuevedo*, 375 F.2d 72 (3d Cir.), cert. denied, 389 U.S. 923 (1967). Whether the question is framed as one of immunity or of the appropriateness of a *Bivens* remedy, however, the court of appeals

[9] Consequently, this is not a case like *Carlson* v. *Green*, *supra*, or *Davis* v. *Passman*, *supra*, where the Court ruled that the special factors counseling hesitation were "coextensive" with the defendants' official immunity. 442 U.S. at 246; see 446 U.S. at 19.

erred by failing to recognize that respondents' suit should be precluded because it is a damages action brought by servicemen against their superiors.[10]

4. This appears to be the first case in which servicemen have been allowed to seek damages from military officials for alleged constitutional violations incident to military service. See, *e.g.*, *Jaffee* v. *United States*, *supra*; *Rotko* v. *Abrams*, 455 F.2d 992 (2d Cir. 1972), aff'g and adopting 338 F. Supp. 46, 48 (D. Conn. 1971); *Laswell* v. *Brown*, No. 81-1768 (8th Cir. July 21, 1982), slip op. 16; *Bailey* v. *DeQuevedo*, *supra*; *Sigler* v. *LeVan*, 485 F. Supp. 185, 189-192 (D. Md. 1980), appeal dismissed, Nos. 80-1160 and 80-1202 (4th Cir. Apr. 29, 1980); *Thornwell* v. *United States*, *supra*; *Misko* v. *United States*, *supra*; *Birdwell* v. *Schlesinger*, 403 F. Supp. 710, 718 (D. Colo. 1975); *Roach* v. *Shields*, 371 F. Supp. 1392, 1393 (E.D. Pa. 1974). See also *Calhoun* v. *United States*, 604 F.2d 647 (9th Cir. 1979), aff'g and adopting 475 F. Supp. 1, 4 (S.D. Cal. 1977), cert. denied, 444 U.S. 1078 (1980); *Hass* v. *United States*, *supra*; *Bailey* v. *Van Buskirk*, 345 F.2d 298 (9th Cir. 1965). But see *Alvarez* v. *Wilson*, 431 F. Supp. 136 (N.D. Ill. 1977), appeal pending, No. 81-2696 (7th Cir.). The impact of the court of appeals' decision is therefore heightened because it is a departure from the uniform rule that military offi-

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[10] In our view, the proper analysis would distinguish between the question whether a *Bivens* remedy should be conferred on a party and the question whether the defendant official is immune from suit. See, *e.g.*, *Harlow* v. *Fitzgerald*, No. 80-945 (June 24, 1982), slip op. 5 n.10, 19 n.36; *Butz* v. *Economou*, *supra*, 438 U.S. at 486, 503. Since the Court has not suggested that the scope of an official's immunity depends on the identity of the plaintiff, an "intra-military immunity" would be another way to express the conclusion that servicemen do not have an implied damages remedy against their superiors.

cers may not be subject to personal damages suits by those they command. Of course, petitioners have not yet been found liable; but the court of appeals' decision leaves no doubt that in some circumstances officers may be held liable for damages in their personal capacities, and it is the "potentially disabling threat[] of liability" and litigation (*Harlow* v. *Fitzgerald*, *supra*, slip op. 5), not the recovery from particular defendants, "that [is] disruptive of discipline and the orderly conduct of military affairs" (*Henninger* v. *United States*, 473 F.2d 814, 816 (9th Cir. 1973)). See also *Nixon* v. *Fitzgerald*, *supra*, slip op. 20 n.32, quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950).[11]

5. Finally, the Court has granted certiorari in *Bush* v. *Lucas*, 647 F.2d 573 (5th Cir. 1981), cert. granted, No. 81-469 (June 28, 1982), which raises related issues. *Bush* is a *Bivens* action by a federal civilian employee against his supervisor for alleged injuries incident to his employment. The United

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[11] It also appears that servicemen are bringing damages actions against their superiors with increasing frequency. We know of 18 such suits pending, seven of which are in the Ninth Circuit. *Alvarez* v. *Wilson*, *supra*; *Jones* v. *Reagan*, No. 81-2918 (7th Cir.); *Elliott* v. *Secretary of the Army*, Nos. 82-5144 and 82-5145 (9th Cir.); *Poe* v. *Kuyk*, Nos. 81-4017 and 81-4018 (9th Cir.); *Todd* v. *Brown*, No. 77-0725 (D. Ariz.); *Ramsey* v. *Lehman*, No. 81-1706 (S.D. Cal.); *Martin* v. *Olmstead*, No. 80-2041-N (S.D. Cal.); *Turner* v. *United States*, No. CV 79-1972-ALS (C.D. Cal.); *Benvenuti* v. *Department of Defense*, No. 81-1803 (D.D.C.); *Bois* v. *United States*, No. 80-1030 (D.D.C.); *Ogden* v. *United States*, No. 82-C-2680 (N.D. Ill.); *Morrow* v. *United States*, No. 81-C-2479 (N.D. Ill.); *Trerice* v. *United States*, No. 81-71392 (E.D. Mich.); *Cender* v. *Johnson*, Nos. 80-180-Civ.-3, 81-40-Civ.-3 (E.D. N.C.); *Vasquez* v. *Maslowski*, No. 81-59-Civ.-3 (E.D.N.C.); *Tufts* v. *Bishop*, Civ. No. 80-1890 (D. Kan.); *Jacobs* v. *United States*, No. 80-108 (D. Ore.); *Graham* v. *Marsh*, No. 80-1321 (S.D. Tex.).

States Court of Appeals for the Fifth Circuit held that special factors deriving from the federal employment relationship, and the alternative civil service remedies available, made it inappropriate to infer a *Bivens* remedy in favor of the plaintiff. Because *Bush* presents an issue analogous to that involved here, there would be little point in the lower courts' conducting further proceedings in this case until *Bush* is decided.

At the same time, we stress that the issues in *Bush* v. *Lucas* are only analogous. Because of the special needs of military discipline, different concerns attend military suits and strongly counsel against allowing a serviceman to pursue a constitutional damages remedy against his superior officers. For this reason, we believe that, regardless of the outcome of *Bush*, this case warrants further review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 79-3172

VERNON WALLACE, ROBERT LEMONS, CORNELIUS HICKEY, JAMES RICHARDSON, and GEORGE SHANNON, PLAINTIFFS-APPELLANTS

v.

COMMANDER GEORGE C. CHAPPELL, LIEUTENANT COMMANDER KENNETH VIAFORE, LIEUTENANT CLARENCE SCHULTZ, LIEUTENANT BARRON BIANCO, LIEUTENANT KENNETH JORDAN, EMC RICHARD MCCANNON, ICC DAVID LAMSER, and MSC LUMBERTO PAPA, DEFENDANTS-APPELLEES

Argued and Submitted Dec. 6, 1979

Submission Vacated Aug. 19, 1980

Ordered Resubmitted Feb. 2, 1981

Decided Nov. 2, 1981

Rehearing and Rehearing En Banc
Denied March 2, 1982

Before GOODWIN, HUG, and FLETCHER, Circuit Judges.

FLETCHER, Circuit Judge:

This action was brought by several black Navy enlisted men claiming discrimination on the basis of

race. The complaint alleged that plaintiffs' superior officers had assigned them the least desirable duties, excluded them from training programs, given them low performance evaluations, and punished them with unusual severity for minor transgressions. It was further alleged that this discriminatory treatment would retard their present and future career development. Plaintiffs claimed violations of both the equal protection clause [1] and 42 U.S.C. § 1985(3) (1976). They sought money damages and declaratory and injunctive relief.

Defendants moved for dismissal or, alternatively, for summary judgment. The district court granted defendants' motion on three grounds: that internal military decisions were not reviewable, that defendants were immune from liability, and that plaintiffs had failed to exhaust their administrative remedies.[2]

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[1] The complaint refers only generally to constitutional violations. Because the allegations of racial discrimination are very specific, however, we construe the general reference to the Constitution as an equal protection claim based on fifth amendment due process, *see e.g., Vance* v. *Bradley*, 440 U.S. 93, 94 n.1, 99 S.Ct. 939, 941, 59 L.Ed.2d 171 (1979); *Buckley* v. *Valeo*, 424 U.S. 1, 93, 96 S.Ct. 612, 670, 46 L.Ed.2d 659 (1976).

Although the complaint might have been drafted with greater precision, it is apparent that the first claim advanced by each plaintiff is in the nature of a *Bivens* action. *See Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (aggrieved party may bring damages action against federal official based directly on violation of fourth amendment). *Bivens* has been extended to fifth amendment equal protection claims. *See Davis* v. *Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979).

[2] We cannot tell from the record whether the district court treated the defendants' motion as one for dismissal under Fed.R.Civ.P. 12(b)(6) or summary judgment under Fed.R.

Plaintiffs appeal.[3]

Civ.P. 56. The plaintiffs, in opposing the defendants' motion, submitted a memorandum of law accompanied by documents evidencing exhaustion of various military remedies. The defendants' reply memorandum disputed the adequacy of the administrative steps taken by the plaintiffs. Since matters outside the pleadings were apparently presented to and not excluded by the court, the defendants' motion should have been treated as one for summary judgment. Fed.R.Civ.P. 12(b).

There are indications in the record that the court did not treat the motion as one for summary judgment. First, although the defendants moved for either dismissal or summary judgment, both the order granting the motion and the corresponding judgment referred exclusively to the "motion to dismiss." Second, although the order stated that the court had "reviewed the pleadings herein [and] the motion and memoranda of points and authorities filed by the parties," the order made no reference to plaintiffs' documentary evidence. Third, the court did not allude to rule 56, mention summary judgment, or purport to find an absence of factual disputes.

We must conclude that the district court erred in dismissing for failure to exhaust administrative remedies. Dismissal on the pleadings would have been improper, for the complaint expressly alleges exhaustion of administrative remedies. Summary judgment would also have been improper, as the record reveals an apparent factual dispute as to whether the administrative remedies were fully pursued. On remand, the district court may invite the parties to submit additional evidence on this issue before passing on the summary judgment motion.

[3] Defendants moved to dismiss this appeal on the ground that the notice of appeal, filed 35 days after entry of final judgment, was untimely. Fed.R.App.P. 4(a)(1) establishes a 30-day period for filing notices of appeal in civil cases. An exception, however, allows 60 days when "the United States or an officer or agency thereof is a party." *Id.* Sitting en banc, this court held that the 60-day period governs the present appeal. *See Wallace* v. *Chappell*, 637 F.2d 1345 (9th

At the outset, we distinguish between the two substantive grounds for the district court's decision: nonreviewability and immunity. Nonreviewability, in the present context, involves the question of whether a court may review a military decision to determine whether a substantive wrong has been committed. This question can arise regardless of the identity of the defendant, *i.e.*, whether the defendant is the United States or an individual federal official, and regardless of whether the remedy sought is damages or some form of non-monetary relief.

The official immunity question, in contrast, arises only when an individual official is sued for damages. If the underlying substantive claims are reviewable, the issue becomes whether the official can be held liable for damages for claims arising out of military service and, if so, under what circumstances.

We are thus presented with two difficult questions: whether constitutional claims by military personnel against their superior officers are subject to judicial review and whether the officers enjoy immunity from liability for money damages in connection with such claims. Because we conclude that some military decisions are reviewable and may give rise to liability for damages, we remand to the district court for reconsideration.

I

REVIEWABILITY

We begin by noting numerous cases in which courts have reviewed internal military decisions. *See*,

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Cir. 1981) (en banc). The motion to dismiss the appeal was denied, and the case was resubmitted to this panel to address the merits. *Id.* at 1348.

e.g., *Brown* v. *Glines*, 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980) (reviewing requirement that prior approval be obtained before circulating petition on base); *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390, 13 L.Ed. 1036 (1851) (reviewing damages claim by enlisted man against superior officer for assault and false imprisonment); *Tigue* v. *Swaim*, 585 F.2d 909 (8th Cir. 1978) (reviewing exclusion of plaintiff from program involving access to nuclear weapons); *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971) (reviewing claim for injunctive and declaratory relief to void erroneous evaluation report); *cf. Schlesinger* v. *Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975) (reviewing equal protection challenge to discharge statute); *Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (reviewing decision by Adjutant General of Ohio National Guard to deploy Guard units on university campus); *Harmon* v. *Brucker*, 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed.2d 503 (1958) (reviewing less than honorable discharge); *Denton* v. *Secretary of Air Force*, 483 F.2d. 21 (9th Cir. 1973), *cert. denied*, 414 U.S. 1146, 94 S.Ct. 900, 39 L.Ed.2d 102 (1974) (reviewing honorable discharge).

In other cases, we have refused to review various military decisions. *See, e.g.*, *Schlanger* v. *United States*, 586 F.2d 667 (9th Cir. 1978), *cert. denied*, 441 U.S. 943, 99 S.Ct. 2161, 60 L.Ed.2d 1045 (1979); *Arnheiter* v. *Chafee*, 435 F.2d 691 (9th Cir. 1970); *Covington* v. *Anderson*, 487 F.2d 660 (9th Cir. 1973). Our cases do not, however, make clear which military decisions are reviewable and which are not. The task we face today is that of clarifying this difficult area of the law.

Any test governing the reviewability of claims arising incident to military service must reflect a careful

balancing of conflicting policy considerations. Militating in favor of review is the plaintiff's strong interest in obtaining adequate redress for harm caused by the unconstitutional conduct of a federal official. In addition, society as a whole has an interest in deterring federal officials from knowingly violating individuals' constitutional rights.

In the military context, however, several countervailing policy considerations are present. A member of the armed forces is at a disadvantage in litigation because he or she often lacks time, money, and the means to procure witnesses. *Cf. Feres* v. *United States*, 340 U.S. 135, 145, 71 S.Ct. 153, 159, 95 L.Ed. 152 (1950) (articulating rationales favoring immunity from damages). Litigation is potentially disruptive to military operations. *See United States* v. *Brown*, 348 U.S. 110, 112, 75 S.Ct. 141, 145, 99 L.Ed. 139 (1954); *Calhoun* v. *United States*, 475 F.Supp. 1, 3 (S.D. Cal. 1977), *aff'd*, 604 F.2d 647 (9th Cir. 1979), *cert. denied*, 444 U.S. 1078, 100 S.Ct. 1029, 62 L.Ed.2d 761 (1980). Permitting litigation can make it difficult to maintain discipline. *See, e.g.*, *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 671-72, 97 S.Ct. 2054, 2057-2058, 52 L.Ed.2d 665 (1977); *Brown*, 348 U.S. at 112, 75 S.Ct. at 143 (1954); *Calhoun*, 475 F.Supp. at 3. Finally, the Supreme Court has voiced a general objection to judges "running the army," *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94, 73 S.Ct. 534, 539-540, 97 L.Ed. 842 (1953), the implication being either that judicial review might usurp a military function or that the courts lack the competence to weigh the factors that might enter into a military decision. Under the Constitution, regulation of military affairs is within the special province of Congress rather than the courts. U.S. Const. art. I, § 8, cl. 14.

The Fifth Circuit has given careful thought to the problem of reconciling certain of these competing policies. In *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971), the court identified several categories of internal military decisions that have been held reviewable and several categories that have not. *Id.* at 199-201. It then articulated a test, to be applied by the trial court, for ascertaining whether a particular military decision should be reviewed. *Id.* at 201-02.

The *Mindes* court held that an internal military decision is unreviewable unless the plaintiff alleges (a) a violation of the Constitution, a federal statute, or military regulations; and (b) exhaustion of available intraservice remedies. If the plaintiff meets both prerequisites, the trial court must weigh four factors to determine whether review should be granted:

(1) *The nature and strength of the plaintiff's claim.* The *Mindes* court recognized that constitutional claims ordinarily carry greater weight than those resting on a statutory or regulatory base, but acknowledged that, within the class of constitutional claims, the nature and strength of the claim can vary widely.

(2) *The potential injury to the plaintiff if review is refused.*

(3) *The extent of interference with military functions.* The court observed that interference per se should not preclude review because some degree of interference will always exist.

(4) *The extent to which military discretion or expertise is involved.*

In *Schlanger* v. *United States*, 586 F.2d 667, 671 (9th Cir. 1978), *cert. denied*, 441 U.S. 943, 99 S.Ct.

2161, 60 L.Ed.2d 1045 (1979), we affirmed a district court decision applying the *Mindes* test.[4] Without discussion, we then applied the *Mindes* test to find a military decision reviewable in *Glines* v. *Wade*, 586 F.2d 675, 678 n.4 (9th Cir. 1978), *rev'd on other grounds sub nom. Brown* v. *Glines*, 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980). We agree that, at least when constitutional claims are asserted,[5] the *Mindes*

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[4] The district court in *Schlanger* had found the particular decision unreviewable. After determining that the district court had properly applied *Mindes*, this court added in dictum that the same result could be reached in "a simpler and perhaps sounder manner" by denying review of all military decisions involving duty assignments. *Id.* at 671-72. For the reasons given in the text, we prefer the *Mindes* approach as a test for reviewability, at least when recognized constitutional claims are alleged.

On two occasions prior to *Schlanger*, we similarly refused to review military decisions involving duty assignments. *See Covington* v. *Anderson*, 487 F.2d 660 (9th Cir. 1973); *Arnheiter* v. *Chafee*, 435 F.2d 691 (9th Cir. 1970). Insofar as those decisions suggest a per se rule that all military duty assignments are unreviewable, they have been superseded by *Brown* v. *Glines*, 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980), where the Supreme Court in fact reviewed a military duty assignment, *see Glines* v. *Wade*, 586 F.2d 675, 677 (9th Cir. 1978).

Our conclusion that there is no per se rule precluding review of duty assignments is bolstered by *Mir* v. *Fosburg*, 646 F.2d 342 (9th Cir. 1980), decided several months after the Supreme Court decision in *Glines*. In *Mir*, the district court had dismissed a state law claim challenging a military duty assignment. We reversed and remanded for a determination of whether the plaintiff should be given leave to amend to allege a federal claim. Our remand order would have been futile if all military decisions involving duty assignments were unreviewable.

[5] We include within this category those statutory claims based on constitutional violations. Consequently, the test we

test is an appropriate means of deciding when military decisions are reviewable. With respect to such constitutional claims, however, we add a qualification that can be articulated only after describing the decision in *Calhoun* v. *United States*, 475 F.Supp. 1 (S.D. Cal.1977), *aff'd* 604 F.2d 647 (9th Cir. 1979) (adopting opinion of district court), *cert. denied*, 444 U.S. 1078, 100 S.Ct. 1029, 62 L.Ed.2d 761 (1980).

In *Calhoun*, the parents of a marine killed during training brought a wrongful death action against the United States and individual officers under the Federal Tort Claims Act. The parents also asserted numerous constitutional claims. The court held that the doctrine of *Feres* v. *United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950) (Government not liable under FTCA for negligence claims arising out of military service), barred recovery, even for the alleged constitutional violations. This holding was based on a conclusion that the constitutional claims were "essentially a restatement of the cause of action in tort." 475 F.Supp. at 5. The court explained:

> Absent the deprivation of a *recognized* constitutional right, it would subvert the application of the Federal Tort Claims Act and its defined exceptions to allow a litigant to superimpose over

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announce today also governs plaintiffs' section 1985(3) claims, which are based on equal protection violations.

We express no view as to whether the *Mindes* test should govern federal nonconstitutional claims. *Cf. Brown* v. *Glines*, 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980) (reviewing claim that regulation prohibiting circulation of unapproved petition on Air Force base violated both federal statute and first amendment, but not discussing test for reviewability); *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390, 13 L.Ed. 1036 (1851) (reviewing common law claims of assault, battery, and false imprisonment).

> that body of law extensions of constitutional rights which were never intended to apply in this context.

Id. (emphasis in original). We distill from *Calhoun* the principle that an allegation of wrongdoing does not assume constitutional dimensions simply because the plaintiff states that it does.

With respect to constitutional claims, therefore, our adoption of the *Mindes* test is limited to cases in which the plaintiff has alleged what the *Calhoun* court described as a "recognized" constitutional right. We do not mean by this term to eliminate from consideration those constitutional claims that have not yet been accepted by the courts. We mean only that the allegations must amount to more than a traditional state law claim.

The *Mindes* approach, as qualified, fairly accommodates the competing policy considerations discussed earlier. By limiting our holding to allegations of "recognized" constitutional violations, we hope to alleviate the understandable concern that a clever pleader can often transform the most innocuous state tort action into a claim of constitutional stature. *See, e.g., Everett* v. *United States*, 492 F.Supp. 318, 322 (S.D.Ohio 1980); *Schmid* v. *Rumsfeld*, 481 F.Supp. 19, 21 (N.D. Cal.1979); *Misko* v. *United States*, 453 F.Supp. 513, 515 (D.D.C.1978). *See also Calhoun*, 475 F.Supp. at 5.

The exhaustion requirement likewise furthers several purposes.[6] When the injured party obtains satis-

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[6] We need not delineate which intraservice remedies must be exhausted in all cases. The availability and usefulness of a particular remedy will vary with the branch of the armed forces involved and with the nature of the grievance. See footnote 11 for citation to the principal intraservice remedies.

faction through military channels, there will of course be no need for litigation. Even if the claimant's efforts prove unavailing, the initiation of an administrative complaint might encourage the defendant officers to cease their allegedly illegal activity, thus mitigating any harm that would otherwise accrue. Perhaps most important, exhaustion of administrative remedies enables the reviewing court to benefit from the views and factfinding of the military authorities. In this way, the exhaustion requirement helps to minimize the objections to reviewability based on judicial usurpation of military discretion and the need for military expertise.

The first two factors that must be balanced under the *Mindes* test—the nature of the plaintiff's interest and the potential injury to the plaintiff if review is withheld—ensure that the plaintiff's interest in redressing the deprivation of constitutional rights is automatically taken into account. The same factors also guarantee that the likelihood of deterring official misconduct will be greatest in those situations in which the interest served by such deterrence is greatest.

The third *Mindes* factor—the extent of interference with military functions—enables the trial court to consider at least three of the policies militating against reviewability: the avoidance of disruption, the potential adverse effect on discipline, and the logistic constraints on a soldier's capacity to defend a lawsuit. The fourth factor—the extent to which resolution of the claim requires military expertise—further reduces the possibility of judicial usurpation of military discretion.

We conclude that the *Mindes* test, as qualified above, provides an appropriate framework for deter-

mining which military decisions are reviewable and which are not.

II

IMMUNITY

If the trial court determines that a particular claim is nonreviewable, the immunity question becomes moot. If the court elects to review the claim, however, and the plaintiff seeks to recover money damages, the issue becomes whether the defendant possesses official immunity.

The district court held that military officials are absolutely immune from liability for money damages for acts committed incident to military service. For the reasons given below, we cannot agree.

In *Butz* v. *Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), the Supreme Court held that federal officials exercising discretion possess only a *qualified* immunity from liability for damages in *Bivens*-type [1] actions alleging constitutional violations. Qualified immunity insulates an official who acts reasonably and in good faith. *See Scheuer* v. *Rhodes*, 416 U.S. 232, 247-48, 94 S.Ct. 1683, 1691-1692, 40 L.Ed. 2d 90 (1974). The Court created an exception, however, for cases in which absolute immunity "is essential for the conduct of the public business." 438 U.S. at 507, 98 S.Ct. at 2911. It recognized that some officials, such as judges, prosecutors, and their administrative agency counterparts, perform "special functions" requiring absolute immunity. *Id.* at 508-17, 98 S.Ct. at 2911-2916. The question presented here is

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[1] *See* note 1 *supra*. The Court in *Economou* was extending *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-48, 94 S.Ct. 1683, 1691-1692, 40 L.Ed.2d 90 (1974), which recognized only qualified immunity in section 1983 actions against state officials, to *Bivens*-type actions against federal officials.

under what circumstances, if any, a military officer comes within the *Economou* exception.

Defendants contend that *Feres* v. *United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950) gives military officials absolute immunity. The plaintiffs in *Feres* sought money damages under the Federal Tort Claims Act for either personal injury or wrongful death allegedly caused by the negligence of military officials. Relying on the language of the FTCA, on related statutory provisions, and on the legislative history, the Court interpreted the FTCA not to authorize recovery of damages from the United States for injuries incurred incident to military service. *Id.* at 146, 71 S.Ct. at 159.

Defendants maintain that *Feres* applies to constitutional violations. We disagree. Even if *Feres* were applicable to intentional torts, a question which has not yet been answered, all that would follow is that the plaintiffs cannot recover under the FTCA. *Feres* says nothing about *Bivens*-type actions, which are based on constitutional violations.

We approach the absolute immunity question, then, with several considerations in mind. In *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390, 13 L.Ed. 1036 (1851), the Supreme Court allowed only qualified immunity from liability in connection with an internal military decision. More recently, in *Economou*, the Supreme Court held that in actions alleging constitutional violations, federal officials generally are entitled only to qualified immunity. The reference in *Economou* to *Dinsman*, 438 U.S. at 492-94, 98 S.Ct. at 2903-2904,[8] indicates that the fact that the consti-

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[8] The reference in *Economou* was actually to the Supreme Court's first opinion in *Dinsman*. *See Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 89, 12 L.Ed. 618 (1849). In that first opinion,

tutional claim was incident to military service would not necessarily preclude recovery.

In deciding whether the present case merits creating an exception to those two holdings, we observe that the rationales favoring reviewability, discussed above, likewise favor allowing recovery of money damages. The plaintiff's interest in redressing a constitutional grievance can often be served only by an award of money damages, which will restore the plaintiff as nearly as possible to the position he or she would have occupied but for the violation. Although society's interest in deterring unconstitutional conduct is furthered in some cases by the prospect of injunctive or declaratory relief, the deterrent effect is enhanced by the possibility of personal liability for money damages. The question before us, however, is whether countervailing considerations justify absolute immunity in the military context.

Many of the reasons that have prompted the courts to apply absolute immunity to other officials have no precise analogue in the military context. Judges and their administrative agency counterparts, for example, enjoy absolute immunity primarily because the adjudication function requires an unusual degree of impartiality, which would be lost if judges were continually in fear of personal liability in issuing decisions. *See, e.g., Butz* v. *Economou*, 438 U.S. 478, 512, 98 S.Ct. 2894, 2913, 57 L.Ed.2d 895 (1978); *Pierson* v. *Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 1217, 18 L.Ed.2d 288 (1967); *Sellars* v. *Procunier*, 641 F.2d 1295, 1299, 1300 (9th Cir. 1981). In addi-

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the Court held that a seaman is liable if he inflicts injury out of malice, *id.* at 123, but ordered a new trial because the trial court had erroneously placed on the defendant the burden of showing genuine motives, *id.* at 132.

tion, judges' insulation from political influence, their use of precedent in resolving disputes, and the availability of appellate review have been thought to reduce the need for private damages actions. *See Economou*, 438 U.S. at 512, 98 S.Ct. at 2913; *Sellars*, 641 F.2d at 1300 n.9. *See also Imbler* v. *Pachtman*, 424 U.S. 409, 422-23, 96 S.Ct. 984, 991-992, 47 L.Ed.2d 128 (1976) (immunity of prosecutor based on considerations analogous to those supporting immunity of judge); *Beard* v. *Udall*, 648 F.2d 1264, 1270-71 (9th Cir. 1981) (same). These rationales do not apply to most routine military decisions made in a noncombat setting during peacetime.

Thus, unless some other consideration warrants a grant of absolute immunity to military officials, we must hold that only qualified immunity applies. We see two such possibilities. First, as we have discussed in connection with reviewability, the soldier is handicapped in defending a civil suit. The need for a strenuous defense might be accentuated if the soldier is potentially liable for money damages. Second, the threat to discipline might be aggravated by the threat of liability for money damages. On balance, however, although we recognize that a grant of absolute immunity might conceivably further those two rationales, the marginal benefit it provides in cases strong enough to survive the nonreviewability barrier does not in our view offset the substantial policies opposing absolute immunity.[9]

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[9] The rationales advanced by *Feres* v. *United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), construing the Federal Tort Claims Act to bar liability of the United States for certain actions incident to military service, either are inapplicable here or have already been considered. First, the *Feres* Court believed it unfair to subject members of the

We therefore hold that once a constitutional claim against a military official has been found reviewable, the official will generally enjoy only a qualified immunity for acts performed in good faith. We recognize, however, that the considerations favoring absolute immunity might be sufficiently strong to warrant exceptions to this rule in certain contexts.[10] We

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armed services to varying standards of liability depending on the law of the place where they are stationed. 340 U.S. at 142-43, 71 S.Ct. at 157-158. This "nonuniformity" rationale is inapplicable to claims based on the Constitution. Second, the *Feres* Court noted that the United States is liable under the FTCA in the same manner that a private individual would be liable under the circumstances. Because military activities lack private counterparts, the Court concluded that Congress could not have contemplated recovery for claims arising out of military service. *Id.* at 141-42, 71 S.Ct. at 156-157. This rationale, of course, is entirely inapplicable to constitutional claims. Third, the Court noted that alternative statutory compensation schemes are available for military personnel receiving physical injuries. *Id.* at 144, 71 S.Ct. at 158. No such statutory compensation is available here.

Similarly inapplicable are two of the rationales previously considered in the context of the reviewability question—the possibility that military operations will be disrupted, and the possibility of courts usurping military functions that they lack the competence to perform. Once a claim has been found reviewable, allowing a damages remedy would not exacerbate either the disruption or the usurpation. In each case, the principal disadvantage arises from the litigation itself.

[10] Possible exceptions, for example, might relate to military officials who perform functions analogous to those of judges and prosecutors. We note also that absolute immunity might attach when decisions are made in a combat setting. *Cf. Tigue* v. *Swaim*, 585 F.2d 909, 914 (8th Cir. 1978) (military officers sometimes enjoy absolute immunity even during peacetime, depending on functions performed and interests to be protected).

leave to future courts the task of articulating exceptions when the need arises.

We also note the availability of the summary judgment procedure for heading off a trial when there is no genuine issue as to bad faith. Although a summary judgment motion must be evaluated in the light most favorable to the party opposing the motion, *see Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962); *Cermetek, Inc.* v. *Butler Avpak, Inc.*, 573 F.2d 1370, 1377 (9th Cir. 1978), any supporting and opposing affidavits submitted in connection with the motion must be based on personal knowledge, Fed.R.Civ.P. 56(e); *Cermetek*, 573 F.2d at 1376. Assertions based solely on information or belief are insufficient to withstand a motion for summary judgment. *Id.* at 1377; *cf. Automatic Radio Manufacturing Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827, 831, 70 S.Ct. 894, 896, 94 L.Ed. 1312 (1950) (such assertions insufficient to *support* motion for summary judgment), *overruled on other grounds, Lear, Inc.* v. *Adkins*, 395 U.S. 653, 671, 89 S.Ct. 1902, 1911, 23 L.Ed.2d 610 (1969). In determining whether there are genuine issues of material fact for summary judgment purposes, we see nothing to prevent the trial court from considering one of the most important objectives of the summary judgment procedure: "the elimination of waste of the time and resources of both litigants and the courts in cases where a trial would be a useless formality." *Zweig* v. *Hearst Corp.*, 521 F.2d 1129, 1135-36 (9th Cir.), *cert. denied*, 423 U.S. 1025, 96 S.Ct. 469, 46 L.Ed.2d 399 (1975). This policy assumes special significance in the military context because of the threat posed by a damages action to military discipline and because of the incon-

venience suffered by a soldier in defending a civilian lawsuit.

III

SUMMARY AND APPLICATION

Our holding may be summarized as follows: If a complaint alleges a "recognized" constitutional claim based on injuries incident to military service, and alleges exhaustion of intraservice remedies, the trial court is to apply the four *Mindes* factors to determine whether the claim should be reviewed. If the claim is found reviewable, and the plaintiff is seeking money damages, military officials will have only qualified immunity except in unusual circumstances that we need not delineate here. When qualified immunity applies, the usual procedures for summary judgment are of course available. A court's ruling on summary judgment may reflect the strong policy against disruption of military functions.

A ruling barring judicial review or establishing absolute immunity is an extreme measure. In the present context, either type of rule would shield from responsibility even an official who knowingly and in bad faith violates an individual's constitutional rights. So drastic a ruling could be justified only by policy concerns of extraordinary magnitude. Our holding today recognizes that precisely such concerns frequently exist in the military context. When they do, nonreviewability or possibly absolute immunity will result. Even when they do not, the military officer will still be entitled to a qualified immunity for acts performed in good faith.

To adopt a per se rule of either nonreviewability or absolute immunity as to all injuries arising out of military service would open the door to a range of

unredressable wrongs bounded only by the limits of one's imagination. Conversely, too assertive a judicial role would potentially implicate many of the legitimate policy considerations examined in this opinion. The intermediate course we adopt today is designed to enable the district courts to balance the concerns discussed above under the circumstances of the cases before them.

In the present case, the plaintiffs allege racial discrimination in duty assignments, selection of personnel for training programs, performance evaluations, and level of punishment for minor offenses. Those allegations, if true, would constitute a denial of equal protection. Plaintiffs thus allege a "recognized" constitutional violation, rather than a traditional state law claim couched in constitutional rhetoric.

Plaintiffs have also alleged exhaustion of administrative remedies.[11] This being the case, the district

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[11] Two principal intraservice remedies are available here. The first, provided by 10 U.S.C. § 938 (1976), authorizes a complaint to any superior commissioned officer. Art. 138, in particular, provides:

> Complaints of Wrongs. Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint . . . .

Second, OPNAV Instructions 5354.1a (1978) (United States Navy Equal Opportunity Manual), prohibits racial, ethnic, cultural, or sexual bias in the administration of justice, work assignments, career planning, off-base housing and the like and establishes a comprehensive procedure for reporting incidents and processing complaints. As indicated earlier, *see* note 2 *supra*, the present state of the record does not permit summary judgment on exhaustion grounds. On remand the court is free to invite submission of further evidence on this issue.

court on remand must consider the four *Mindes* factors bearing on reviewability. The district court must exercise its discretion in balancing these factors, and we express no view as to what the outcome should be. If the claims are found reviewable, the defendants will possess qualified immunity from liability for money damages. The plaintiffs will of course have to demonstrate exhaustion of administrative remedies before actually going to trial. Summary judgment might be appropriate if the plaintiffs are unable to demonstrate exhaustion.

The judgment of the district court is reversed, and the case remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-3172

VERNON WALLACE, ROBERT LEMONS, CORNELIUS HICKEY, JAMES RICHARDSON, and GEORGE SHANNON, PLAINTIFFS-APPELLANTS

v.

COMMANDER GEORGE C. CHAPPELL, LIEUTENANT COMMANDER KENNETH VIAFORE, LIEUTENANT CLARENCE SCHULTZ, LIEUTENANT BARRON BIANCO, LIEUTENANT KENNETH JORDAN, EMC RICHARD MCCANNON, ICC DAVID LAMSER, and MSC LUMBERTO PAPA, DEFENDANTS-APPELLEES

[Filed Mar. 2, 1982]

Before: GOODWIN, HUG, and FLETCHER, Circuit Judges.

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 78-0579-N

VERNON WALLACE, EL AL., PLAINTIFFS

v.

COMMANDER GEORGE C. CHAPPELL, ET AL., DEFENDANTS

[Filed Jan. 30, 1979]

ORDER OF DISMISSAL

Defendants' motion to dismiss came on for hearing before the court on January 8, 1979. Having reviewed the pleadings herein, the motion and memoranda of points and authorities filed by the parties, and having heard the argument of counsel, it is the opinion of the court that the motion to dismiss should be granted on the following grounds:

1. That the actions complained of are nonreviewable military decisions;
2. That public policy compels that the defendants be entitled to intra-service immunity;
3. That the plaintiffs have failed to exhaust their administrative remedies.

Accordingly, defendants' motion to dismiss is granted without leave to amend.

DATED: January 29, 1979.

/s/ Leland C. Nielsen
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 78-0579-N

VERNON WALLACE, ET AL., PLAINTIFFS

v.

COMMANDER GEORGE C. CHAPPELL, ET AL.,
DEFENDANTS

[Filed Jan. 30, 1979]

JUDGMENT

Defendants' motion to dismiss came on for hearing before the court, Honorable Leland C. Nielsen, United States District Judge presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the complaint be dismissed.

DATED at San Diego, California this 30 of January, 1979.

/s/ Leland C. Nielsen
United States District Judge

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